Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the matter of	)	
	)	
2002 Biennial Regulatory Review	)	MB Docket No. 02-277
Review of the Commission's Broadcast	)	
Ownership Rules and Other Rules	)	
Adopted Pursuant to Section 202 of the	)	
Telecommunications Act of 1996	)	
	)	
Cross-Ownership of Broadcast Stations	)	MM Docket No. 01-235
and Newspapers	)	
	)	
Rules and Policies Concerning Multiple	)	MM Docket No. 01-317
Ownership of Radio Broadcast Stations	)	
in Local Markets	)	
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

REPLY COMMENTS
OF THE AMHERST ALLIANCE

1 February 2003

The Amherst Alliance hereby submits Reply Comments in the above Matters before the FCC, as solicited by the Commission in respect to issues related to and including its Biennial Regulatory Review process, mandated in § 202 of the Telecommunications Act of 1996, as amended. The Amherst Alliance submits these Reply Comments as the consensus viewpoint of a broad diversity of American citizens concerned about media ownership regulatory issues.

The Amherst Alliance

The Amherst Alliance is a Net-based, nationwide, all-volunteer organisation of citizens interested in American media. It is more specifically a citizens' advocacy group, founded in Amherst, Massachusetts in September of 1998 by Don Schellhardt, and William C. Walker. Originally focussed on the then-impending issue of low-power radio (later narrowed to LPFM), the Amherst Alliance has since expanded its scope to include all areas of media regulatory reform, review, and improvement. Amherst places particular emphasis on the manner in which media regulation policies affect perceived critical factors such as media, ownership, and programming diversity, localism, and the free marketplace of ideas that is vital to the longstanding health and well-being of the American model of representative democracy.

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Introduction

THE AMHERST ALLIANCE hereby submits these Reply Comments in the various Dockets in which restrictions on media ownership have been raised as issues.

In addition, however, Amherst plans to submit Written Testimony for the recently announced Field Hearings in Richmond on February 27, 2003. We commend FCC Commissioner Michael Copps for his labors in making these Hearings a reality—and we commend the rest of the Commission for agreeing to his proposal.

Working through Commissioner Copps' office, THE AMHERST ALLIANCE has requested the opportunity to present Oral Testimony—that is, to testify in person—in Richmond. We hope that the Commission will agree to this request as well.

In any event, today's Reply Comments do not necessarily constitute the sum of what THE AMHERST ALLIANCE has to say about media ownership restrictions. We expressly reserve the right to present additional analyses, arguments and/or information in Written Testimony (and Oral Testimony) for the Richmond Hearings.

Origin of Current Discussion: 1996 Telecommunications Act

Section 202(h) of The Telecommunications Act of 1996[1] mandates the FCC to conduct a regular biennial review of its standing media ownership regulatory rules. Specifically relevant to these proceedings is the common but erroneous perception that this statutory language requires the Commission to assume that such rules are longer necessary, and thus no longer valid, upon the close of each biennial review, unless the review process demonstrates a valid need to retain one or more rules. Our attached analysis, "What Section 202(h) of the Telecommunications Act of 1996 Actually Requires", addresses and rebuts this misconception of the statutory mandate. In recent years, federal courts have demanded that the FCC produce more clearly substantive empirical evidence supporting its maintenance of existing media ownership rules.[2] To this end, the FCC solicits in these proceedings substantial input from a broad range of sources, including its own studies[3], various outside studies[4] and reports, and public commentary.[5]

FCC Seeks Input on Ownership Issues

While the Commission has earnestly and repeatedly solicited public input in these Matters, and particularly in respect to the Biennial Review, it has also and equally earnestly requested that submissions include as much detailed and substantive empirical evidence as possible, in order to foster more informed decisions—and, presumably, improved defence against court challenges.

Amherst is not equipped to provide such substantive empirical data. Neither can we speak with expert authority to the more esoteric aspects of the twelve studies submitted by the Media Ownership Working Group, many of which were conducted and

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[1] Telecommunications Act of 1996, Public Law No. 104-104, 110 Statute 56 (1996).

[2] *Fox Television Stations, Inc. v. FCC,* 280 F.3d (*rehearing granted,* 293 F.3d 537 (D.C. Cir. 2002), and *Sinclair Broadcast Group, Inc. v. FCC,* 284 F.3d (D.C. Cir. 2002).

[3] 1 October 2002, Media Bureau of the FCC releases twelve studies by the Media Ownership Working Group. The FCC has stated that these studies will be central to these proceedings.

[4] Most notably, the Office of Plans and Policy's *Roundtable Discussion on Media Ownership Policies,* in re MM Docket Nos. 01-235, 96-197, 92-264, 94-150, 87-514, and CS Docket Nos. 98-92 and 96-85, held 29 October 2001 in Washington, DC.

presented using sophisticated statistical methods that with all honesty should be largely baffling for the great majority of non-experts. This observation does not demean or devalue these ample studies, but rather draws a sharp distinction between professionally-commissioned inside studies and public input.

Amherst intends, therefore, to address the rational issues surrounding media ownership regulation within these proceedings, particularly in context of the larger frame of the entirety of American media, and especially with the view of our media as the vital supply chain of necessary information to the general populace that is expected to make decisions critical to the fate and future of our special democracy.

High Stakes of Ownership/Diversity Questions

Of all FCC-related proceedings in which we have participated, it is perhaps most difficult to overstate the gravity and importance of this one. We cannot put it better than Commissioner Copps has: "At stake is how this industry is going to look in the next generation and beyond. At stake are core values of localism, diversity, competition and maintaining the multiplicity of voices and choices that undergird our precious marketplace of ideas and that sustain American democracy. And at stake is the quality and type of the entertainment available to all of us."[6] It is paramount in these proceedings that the Commission remain focused on the core goals of its regulatory philosophy: competition, diversity, and localism.

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[5] All Comments and Reply Comments filed in MB 02-277, including by reference all Comments and Reply Comments in MM Docket Nos. 01-235, 01-317, and 00-244.

[6] *Remarks* of FCC Commissioner Michael J. Copps, before the Columbia Law School Forum on Media Ownership, 16 January 2003.

Amherst's Participation in Civic Debate

Like many other commenters, The Amherst Alliance views the 1996 Telecom Act as a seriously flawed statute, containing provisions which have done serious damage to the free flow of ideas and information within the United States of America. From our inception in 1998, we have favoured amending this Act to correct its flaws, and we continue to favour such action. Nevertheless, in this specific case, our analysis shows that Section 202(h) is more flexible than generally imagined. If the Commission's analyses and other deliberations are sufficiently thorough, Section 202(h) in fact allows the Commission enough latitude to act responsibly on media ownership restrictions, without being overruled later on by a court.

Finally, we will offer a number of views on the stated conclusions of the various studies submitted in this proceeding, with the intent of providing the reaction and interpretation of ordinary people who are not statisticians, but consumers and citizens. In the final analysis, economic considerations, however weighted, must inevitably be fairly balanced with democratic concerns. No degree of industry efficiency accomplished through economies of scale can ever counterbalance the loss of integrity of a nation whose populace is no longer adequately informed, whose culture is diluted to simple commodity standards, and whose cynicism is made complete by a media structure so vast and powerful that it no longer has any real need or desire to respond to them, and a political estate that has been rendered irretrievably remote through that same mechanism. Media owners may profit more handsomely from consolidation, but the devaluation of our way of life and our political solvency cannot be measured by the same means and standards, and cannot be described in any comparative economic or consumer study, no matter how thorough.

Late Developments

As of this writing, Congress has just begun to address these issues. Responding to complaints from constituents of all kinds, including listeners, musicians, and broadcasters, Congress is beginning to sense a growing alarm in the public over the ever more apparent effects of media consolidation due to regulatory relaxation. While these newest developments are related to the issues addressed in this paper, the discussion at hand is directly related to the existing statutes, their direct effects, and potential effects of modification of those rules. If and when current Congressional action results in changes to the underlying statutes referenced in this proceeding, however, we reserve the right to provide updated material relevant to such changes.

Part I: Commissioned Input

Introduction

We would like to first express our disappointment that the Commission has provided such a short amount of time for study and commentary in these combined Dockets. We feel that these issues are extremely important and deserve as much time for consideration as can be afforded. While we are aware of outside demands to reach decisions in these Matters, we nevertheless must question the actual value of decisions arrived at under duress of time, and necessarily lacking the full public review these issues demand. Given the enormous stakes involved, we maintain that it is not in the best interests of the public to enforce such time-constrained limitations on public review and input.

We further question the overall value of the below-described empirical studies commissioned for this biennial review. As noted by Commissioner Copps[7] and others, there is no special or compelling reason to presume that these twelve studies adequately address the critical issues involved. Yet it seems now that despite earnest solicitation of public input, it is these studies that will form the core of the decision-making process. As much as we appreciate the Commission's need to provide substantial empirical data to support its decisions in the face of legal challenges, we

[7] *Remarks* of FCC Commissioner Michael J. Copps, before the Columbia Law School Forum on Media Ownership, 16 January 2003.

must question whether or not the studies here adequately supply that foundation. We maintain that there are broader issues to consider, beyond consumer and market concerns, and that none of these studies adequately addresses what we feel are more vital questions of the potential impact of media consolidation and concentration on less quantifiable concerns such as the effective dissemination of a diverse range of news and information to the general public, and access of less-advantaged community voices, particularly local voices, to all media.

With this in mind, we provide the following reactions to the twelve empirical studies submitted by the Media Ownership Working Group, as specifically requested in this action. Nevertheless, we again stress that these studies, both individually and together, do not, to our estimation, adequately fulfill the informational requirements demanded either in the NPRM or in the general realm of media ownership regulation, and we further advise the Commission to reconsider the real value of these studies.

The title information is provided for each study, followed by the Commission's own short summation of the findings in each.[8] Given the very short time frame allowed for these public comments, we are forced to base our reactions in part on these short remarks provided by the Commission. We presume that the Commission's own remarks are fully valid and appropriately reflect an objective digest of the findings in each study, and therefore we believe that it is equally valid and appropriate to respond to those remarks, as valid as responding to the full content of each study.

A: MOWG Studies

Introduction

The Media Ownership Working Group, announced in October 2001,[9] is charged with gathering the body of empirical evidence required to explain and justify the Commission's impending decisions in this third biennial review process. The MOWG commissioned twelve empirical studies and submitted them in October 2002. After some public discussion, the Commission fixed a final deadline for Comments and Reply Comments.[10]

1. Consumer-Oriented Studies

a. *A Comparison of Media Outlets and Owners for Ten Selected Markets: 1960, 1980, 2000* — Scott Roberts, Jane Frenette and Dione Sterns, Industry Analysis Division, Media Bureau, F.C.C. (Study #2002-1)

> FCC Summation of Authors' Findings: The number of media outlets (radio stations, television stations, newspapers, cable systems, and DBS operators) available to consumers in the ten markets surveyed has increased by an average of 195% since 1960, and the number of independent owners of those outlets has increased by 139%.

Response: The study findings provided above describe only a one-dimensional linear ratio, implying an increase in outlets and owners over 40 years. However, if the ratios are compared crosswise to each other, we find that the increased ownership provides an average of only 1.4 additional outlets per owner, which seems a little short, given the

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[8] *FCC Releases Twelve Studies on Current Media Marketplace: Research Represents Critical First Step in FCC's Fact Finding Mission*, FCC News Release, 1 October 2002.

[9] *FCC Chairman Michael Powell Announces Creation of Media Ownership Working Group*, FCC News Release, 29 October 2001.

[10] *FCC Seeks Comment on Ownership Studies Released by Media Ownership Working Group and Establishes Comment Deadlines for 2002 Biennial Regulatory Review of Commission's Ownership Rules*, Public Notice (DA 02-2476), 1 October 2002.

timeframe. We would hope that media owners would be able to put up an average of more than one and a half new outlets each, given four decades to do it.

Furthermore, the study fails to track these changes against the valid control numbers found in the change in national population over the same period. The most current historical figures from the US Census Bureau show that in fact, the national population has increased fully 51% over the past 40 years.[11] Adjusting for this consideration, we find that the actual rate of media outlet expansion is a little disappointing, especially given that nearly half of these media arrived in the last twenty years. In respect to ownership of that media over the same period, we find the rate even more disappointing.

Most disappointing of all, however, is the study's failure to separately compare these same trends in the wake of the Telecommunications Act of 1996. While the 20- and 40-year trends are interesting and possibly useful as a general picture of national media over the past half century, the absence of a direct comparison to the post-Telecom Act period deprives the study of a real and meaningful consideration of the market effects of relaxed ownership caps—a central consideration of this proceeding.

It would be much more useful if the study showed us data year-by-year, especially over the last 10-15 years, so that the effects of important events in the history of media can be seen more clearly. As it is, the 20-year-mark figures seem to reveal very little data describing these effects.

Amherst therefore advises the Commission to give only moderate weight to this report, given its failure to directly address the effects of recent relaxation of major ownership rules.

b. *Consumer Substitution Among Media* — Joel Waldfogel, The Wharton School, University of Pennsylvania. (Study #2002-3)

> FCC Summation of Author's Findings: Using a variety of supply side and demand side econometric models, there is the clearest evidence of substitution between the Internet and broadcast TV both overall and for news consumption; between daily and weekly newspapers; and between daily newspapers and broadcast TV news. There is also evidence of substitution between cable and broadcast channels, both overall and for news consumption; between cable and daily newspapers both overall and for news consumption; between radio and broadcast TV for news consumption; and between the Internet and daily newspapers for news consumption. There is little or no evidence of substitution between weekly papers and broadcast TV, between radio and the Internet, or between radio and cable.

Response: The study takes a macroscopic approach to substitution, which may overlook important details. One cannot seriously suggest, for example, that the news content of a weekly paper in any way replaces the far more detailed and extensive coverage of a daily paper. The study appears to also overlook differences in cost of different outlets of the same media. Weekly papers, for example, are oftentimes free, while daily papers almost always cost money.

Although the study provides compelling evidence of substitution, as shown by some striking figures (most notably between daily and weekly papers), comparative trends between media do not necessarily bear any relationship to content substitution

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[11] *Historical National Population Estimates: July 1, 1900 to July 1, 1999*, Population Estimates Program, Population Division, U.S. Census Bureau; Rev. June 28, 2000

by consumers. Such trends may simply reflect changing habits of consumers, including changing needs and desires, the appeal of new products, declining interest in one or more areas, the effects of external economic trends, or, again, the comparative cost of different media (both for suppliers and consumers).

We note that the analytical body of the report goes to very great length to describe its own inherent shortcomings. The authors have made every reasonable effort to draw out the data they seek, and have based their evaluations on a very impressive body of independent work, but in the end conclude that, "some of these questions will only be answered with additional research."

Finally, this study also fails to compare the post-Telecom Act period with pre-Act trends, or with overall trends over a similar period. Without this critical contrast, it is not possible to evaluate these findings in context of the massive media conglomeration that has taken place over the past six years. In fact, the defined range of the study fairly straddles the Act itself, which might actually serve to render a great deal of this data practically useless for that purpose.

Amherst advises the Commission to consider this report in respect to substitution trends, but to bear in mind the many uncertainties involved. We do not consider it particularly useful in respect to evaluating ownership trends, as it does not illustrate effects of rapid, large-scale market consolidation and concentration.

c. *Consumer Survey on Media Usage* — Nielsen Media Research. (Study#2002-8)

FCC Summation of Authors' Findings: The Media Ownership Working Group developed a series of questions regarding Americans' media usage habits and commissioned Nielsen Media Research to conduct an extensive survey on these questions. Complete results of the survey are available at www.fcc.gov/ownership

Response: This is a voluminous mass of raw survey data, collected and compiled by Nielsen Media Research at the request of the FCC. It is the largest document among the dozen studies commissioned. Unfortunately, no summary or analysis is provided, either by Nielsen or by the Commission. Without the armies of statistical analysts necessary to consume and digest this data, it is useless to us, and, we presume, any other commenter who is also not similarly equipped. Even if we did have such skilled resources available to us, it would not be remotely possible to evaluate this report within the time allotted.

While we do not reject this report outright, we wonder why the FCC points to it as a core document, when it is useful to only a very small minority of commenters. Meanwhile, it is impossible for us to estimate its significance in context of media ownership issues.

In respect to this document, Amherst therefore advises the Commission to provide a detailed digest, summary, and analysis, and allow outside commenters appropriate time to evaluate same and reply accordingly. Short of these provisions, we declare the document useless as a public comment resource in the current proceeding.

d. ***The Measurement of Local Television News and Public Affairs Programs —*** **Thomas Spavins, Technical and Public Safety Division, Enforcement Bureau, F.C.C.; Loretta Dennison, Jane Frenette, Scott Roberts, Industry Analysis Division, Media Bureau, F.C.C.** (Study #2002-7)

> FCC Summation of Authors' Findings: This paper evaluates the quality and quantity of local news and public affairs programming on network owned-and-operated (O&O) stations, network affiliates, and the subset of affiliates that are co-owned with a newspaper publisher. With respect to ratings - the first quality measure - O&Os and affiliates were virtually identical during the period tested. With respect to the receipt of RTNDA and DuPont awards for news excellence - the second quality measure - O&Os received those awards at a rate of 231% of the national average and affiliates received them at 87% of the national average. As to total output, O&Os produced an average of 23% more local news and public affairs programming than did network affiliates. Separately, within the overall group of network affiliates, newspaper-owned affiliates outperformed other affiliates in all measures of quality (local news ratings: 8.0 to 6.3; news awards: 260% of national average versus 31%); and total output per week (21.9 hours versus 14.9 hours).

Response: The conclusions of this report are clear enough from the above digest. We also concur that the study addresses one or more legitimate ownership issues, and draws out significant data. Assuming the validity of the figures provided, the report makes a good argument in favour of network O&O's. Even more so, the study implies a strong relationship between cross-ownership with newspapers and improved news coverage. We caution, however, that this relationship does not by itself indicate that same-market ownership regulations should be relaxed. A similar comparative study between the fifty or so grandfathered or waived same-market newspaper-broadcast combinations to a similar number of conventional markets might be much more revealing.

e. *Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign* — **David Pritchard, Department of Journalism and Mass Communication, University of Wisconsin-Milwaukee.** (Study #2002-2)

> FCC Summation of Author's Findings: Of the ten commonly-owned newspaper-television combinations studied, five exhibited a similar slant in covering the final weeks of the 2000 Presidential election, while five exhibited divergent slants.

Response: By the author's own admission, the results of the study are entirely inconclusive, both statistically and rationally. The study provides no evidence that same-market cross-ownership is likely to result in a correlation in political news slant. Neither does it provide any assurance that it will not, however. The author also admits that the sample group is too small to provide any major insight into possible trends of large-scale same-market cross-ownership relaxation, even if any visible trends were revealed by the sample group.

Amherst advises the Commission to ignore the findings of this study for purposes of evaluating the potential effects of relaxation of the newspaper-broadcast and newspaper-radio cross-ownership rules.

f. *Program Diversity and the Program Selection Process on Broadcast Network Television* — **Mara Einstein, Department of Media Studies, Queens College, City University of New York.** (Study #2002-5)

> FCC Summation of Author's Findings: This study examines program diversity on broadcast network television in the years surrounding the implementation and repeal of the FCC's financial interest and syndication (fin-syn) rules. Using a variety of statistical measures of program genre, the study finds that the fin-syn rules did not improve program diversity. The paper also addresses the program selection process at broadcast networks and concludes that networks are influenced to a significant extent by the financial incentives associated with the ownership of programming.

Response: The report studies the measurable relationship between television programming diversity and content-ownership rules. The results strongly imply a negative relationship: Television programming diversity, as measured by a battery of statistical criteria, fell off during the regulatory period that "fin-syn" was in effect, and, after a brief stumble, bounced back following repeal. In all, the report constitutes an effective and compelling indictment of fin-syn as an antagonist of diversity—the opposite of its intended effect.

We must be careful how much is read into this, however, in context of the current debate. There is a world of difference between media content and media outlet ownership. No current rules restrict or forbid content distribution between different media or owners. Conversely, fin-syn had no influence on outlet ownership in any form. It may not be useful, and may in fact be misguided, to consider any similarity between the indicated benefits of repeal of fin-syn, and speculative effects of relaxation of media outlet ownership rules.

It is interesting to note, by the way, that the author apparently does not consider the television programming effects resulting from the high-profile threat of an industry-wide writers' strike in early 2001. Media news coverage at the time clearly stated that television programmers and producers scrambled feverishly to convert their formats away from writing-intensive programmes and towards formats that were easy to make with little or no writing, and, as an added bonus, also cheaper--that, combined with the present availability of very successful programmes, most already created and proven by foreign developers. ("Who Wants to be a Millionaire?" is a British creation, "Survivor" Swedish, "Big Brother" is Dutch in origin, and "The Mole" is from Belgium.) Splashy newsmagazines were also almost certainly a response to the threatened strike, as were inexpensive spinoffs of incumbent successes like "Law & Order," and flashy (but very inexpensive) game shows like "The Missing Link." That high-class dramas held on is no mystery, as these shows have always been the big earners—and leading competitive products—of major networks.

In general, the study provides a very thorough and detailed case for its central focus, but in the end, speaks almost not at all to ownership issues as we consider them in this proceeding. Amherst advises the Commission to give little weight to this study in respect to current media ownership questions.

2. Market-Based Studies

a. *Broadcast Television: Survivor in a Sea of Competition* (F.C.C., Office of Policy and Plans Working Paper) — Jonathan Levy and Marcelino Ford-Livene, Office of Policy and Plans, F.C.C.; Anne Levine, Industry Analysis Division, Media Bureau, F.C.C. (Study #2002-12)

> FCC Summation of Authors' Findings: Broadcast television's viewing share continued its decline over the last 11 years, dropping during the 1990-2001 period by 31 percent all-day and 33 percent in primetime over all households. The broadcast share of video advertising revenues also dropped, but by only 21 percent, and the actual level of broadcast advertising revenues rose in every year since 1990 with the exception of 2001. DBS and the expansion in cable availability and channel capacity have created an increasingly competitive environment for television broadcasting. This will lead to continuing audience fragmentation and further pressure on broadcast advertising revenues. The increasing competition for program production resources has led to an increase in production costs. The future profitability of the broadcast industry will depend on how it responds to competition and cost pressures, and on whether

it can harness new technologies such as DTV and interactive services to its benefit.

Response: Cable television's competitive advantage over broadcast is legend: Broad distribution of centrally-originating content, combined with fewer content restrictions, has given CaTV the upper hand for decades, but the effects didn't really take hold until cable became ubiquitous enough to effect large-scale substitution across vast ranges of the general populace. In the end, the ready availability of clear signals and many channels easily outperformed the inherent restrictions of single-channel over-the-air programming. Satellite TV may turn out to have a similar effect on CaTV in the coming decades, and satellite radio may do the same for terrestrial stations. Broadband internet may end up on top of all of them. At this point, no one can know for certain what the future holds.

The report paints a dim picture for broadcast television, and this tends to beg for remediation, presumably in the form of expanded cross-ownership allowances. Perhaps the successful cable carrier could shore up the transmitter, but one must wonder, what would they really do with it? More to the point, where is the evidence—or even the suggestion—that that remedy would pan out if implemented? It might help. It might not. We don't know. This report does not answer those questions. It may also be that broadcast TV will inevitably be supplanted by CaTV and satellite, no matter what remedies are tried, and that it simply must accept its fate. In fact, however, it remains the predominant source for locally-originating content, and it might do well if it can adapt to that niche.

We stress also that there is no evidence that technological improvement in and of itself stimulates increased audience. This is a point we make in respect to all media. Consumers make their viewing choices based primarily on the basis of content; HDTV and DTV do not, by themselves, improve content. Where technology can make a substantial difference is in increased programming and content access (as with CaTV) or expanded services (as with WebTV, and possible advanced applications of DTV and ITV). In this realm, however, broadcast will likely still face competition from CaTV and DBS on a level commensurate with current market patterns. Ultimately, broadcast should probably focus on its unique ability to provide special locally-oriented programming, as this is the main area where wide-range services cannot compete with it. Again, this does not point to ownership issues.

Amherst asserts that this report does not speak clearly to the current debate on media ownership regulations, but it is a useful document for what it does illustrate about differently-delivered media competing in the same market.

b. *On the Substitutability of Local Newspaper, Radio and Broadcast Television Advertising in Local Business Sales* — C. Anthony Bush, Administrative Law Division, Office of the General Counsel, F.C.C. (Study #2002-10)

> FCC Summation of Author's Findings: The paper examines data from 45 randomly-selected DMAs to ascertain the extent to which local radio, local television, and daily newspapers compete for advertising dollars from local businesses. The evidence generally suggests weak substitutability among the three media tested. Specifically, with respect to the three media pairs studied, the paper finds: (1) The elasticity of substitution between newspaper and radio advertisements is 1.16936. This number is small but statistically significant; (2) The elasticity of substitution between newspaper and television advertisements is 0.91459. This number also is small but statistically

significant; and (3) The elasticity of substitution between local radio and local television is 0.3094, which is not statistically different from zero.

Response: The author cautions that the study is limited in its utility by unavoidable measurement deficiencies in sample data, and that the results cannot be considered conclusive, though they are not inconsistent with economic theory. The study generally suggests weak substitutability between the three leading local media—newspaper, television, and radio—in respect to advertising sales. This may or may not offer suggestions about possible strategies or consequences of modification of ownership rules, depending on which market theory is followed. As it stands, the study appears to support the idea that local media do not compete with each other for advertising as much as might be expected.

What this suggests for ownership, however, is not obvious. Increased local cross-ownership might enable a newspaper to help balance out the revenue stream for a local broadcast facility (or vice versa), but an equally valid question is to what degree might the two begin to cancel each other out through repetition of content, viewpoint, and sponsorship.

We would ask that the Commission keep in mind, however, that there is much more to market diversity than advertising revenue patterns. We suggest that weak substitutability may reflect how different media meet different needs of a consumer population, and that high concentration of local media may result in increased substitutability as important distinctions between them may be diminished.

c. *Radio Industry Review 2002: Trends in Ownership, Format and Finance* — George Williams and Scott Roberts, Industry Analysis Division, Media Bureau, F.C.C. (Study #2002-11)

> FCC Summation of Authors' Findings: Between 1996 and 2002, the average number of radio station owners in each market decreased from 13.5 to 9.9. During same period, the average number of formats remained virtually unchanged (10.1 formats in 1996 vs. 10.2 in 2002). In 1996, the largest station owner in each market received an average of 35.6% of radio advertising revenue. In 2002, the largest owner receives 46.8% of such revenue.

Response: The results here seem clear enough: Relaxation of broadcast ownership caps has resulted in increased industry consolidation. Yet the number of formats remained stable, suggesting that the much-vaunted "economies of scale" are at work, making money for media owners. One might wonder, however, why these big savings have not translated into greater format diversity. It's a more efficient engine on the revenue and profit end, but the product output remains essentially unchanged for consumers. For those listeners who are dissatisfied with their current choices, this is surely a disappointment.

d. *Consolidation and Advertising Prices in Local Radio Markets* — Keith Brown and George Williams, Industry Analysis Division, Media Bureau, F.C.C. (Study #2002-4)

> FCC Summation of Authors' Findings: Increased concentration of ownership in local radio markets between 1996 and 2001 explains 3-4% out of the 68% increase in real advertising rates during this period. Economic growth explains much of the other 65%. National concentration does not appear to drive the increase in advertising prices. Finally, a greater presence of large national owners in a local market appears to decrease the advertising rates paid by national and regional advertising agencies.

Response: If media ownership concentration is responsible for any increase at all in advertising rates, then the much-vaunted "economies of scale" are not doing much for advertisers. That this same system may inequitably favour larger advertisers over smaller ones is not good news, given that the bulk of American companies are small businesses. This trend would seem to run counter to the Commission's stated goal of localism in broadcasting.

The authors make the suggestion (based on a theory by Becker and Murphy in 1993) that increased advertising rates may actually benefit listeners, in that broadcasters' use of rates to leverage their influence over advertisers may lead to decreased advertising on the air. There are at least three problems with this: First, how likely is it that broadcasters will really pass up advertising revenue in order to nudge up ad rates? Second, assuming that they might be so inclined (perhaps if they believed it might boost listenership), how much incentive is the 3-4% the authors believe is the small portion attributable to ownership concentration? Third, does this small difference, with its wholly speculative and dubiously small benefit to listeners, really justify the inevitable decrease in localism that must first be given up to effect this benefit?

There is also the obvious point that increased ownership concentration translates directly into decreased same-market competition within any given medium. The tiny amounts of ad substitution with newspapers detected by Mr. Bush[12] (less than 1.5%) promise little relief for advertisers. If newspapers are also able to jack their ad rates up through further consolidation, in this or some other consideration, will they, too, reduce their ad volume? Noting that this tiny amount is the only local media substitution that

[12] Study #2002-10; see 2-b, above

Bush's study detected at all for radio advertising, where does this leave advertisers, especially local advertisers, who appear to be disadvantaged by pricing trends attributed to concentration? What will "local" media look like, when national advertisers can wield the benefit of their economies of scale over local advertisers?

Even more ominous, the authors record a 26% decrease in the total number of owners for their sample group. This is very significant, even when adjusted for population growth over the same period.[13] For those citizens who are deeply concerned about increased radio concentration and overall media conglomeration—and particularly its inherent impact on localism—this study offers unpleasant implications for the future of local radio listening, as well as for local advertisers.

Amherst asserts that this study suggests that radio ownership concentration offers a very small benefit to radio stations, especially when balanced against the decrease in locally-owned and independent radio, that it may unfairly disadvantage small and local advertisers, and that it promises no significant or assurable benefit to listeners. It does, however promise decreased localism in content, as well as an ominous picture for overall ownership concentration.

[13] 5.7% calculated population growth, based on change in total national population figures, from estimated totals from 1 July 1995 (see Footnote 11) to projected total for 1 July 2001 (Middle Series); *Annual Projections of the Total Resident Population as of July 1: Middle, Lowest, Highest, and Zero International Migration Series, 1999 to 2100* (Doc. NP-T1), Statistical Information Staff, Population Div., U.S. Census Bureau.

e. ***Radio Market Structure and Music Diversity* — George Williams, Keith Brown, and Peter Alexander, Industry Analysis Division, Media Bureau, F.C.C.** (Study #2002-9)

> FCC Summation of Authors' Findings: This study applies a unique playlist-based measure of product diversity for radio stations and applies that measure to radio station playlists to examine changes in diversity since 1996. During the 1996-2001 period, the average measure of diversity for the nationwide sample increased slightly from 9.26 to 9.32, or 0.74%. The study also finds a decrease of 2.4% in the diversity of songs within the same format across local markets. In addition, the study finds an increase of 11.48% in the diversity of songs within the same format within each local market.

Response: Employing some very impressive statistical mathematics, this study was performed by analysing the top songs from playlists of "a large sample of radio stations [302 in 1996 and 288 in 2001]....for the most part...in the top tier markets" in March 1996 and March 2001. How much is actually revealed by these very narrow samplings is certainly questionable. The authors note that the markets from which they picked their sample group comprise "over 60% of all listeners", but the sample group itself does not cover all of this listener territory, only a portion of it, and the sample period comprises only two months at either end of a range of eighty-four, or only about 2.4%. Moreover, the choice of top-tier markets limits the study to only large markets, thereby overlooking the possibly different impact on smaller markets, particularly bottom-tier markets, where concentration can be extreme, and competition minimal.

That the study finds almost no change in diversity (only +74%) may or may not be indicative, given the very narrow sampling; in our estimation it neither proves nor disproves any playlist diversity effect due to concentration. The same is true for the small decrease in playlist diversity across local markets, and the more hopeful increase within formats in the same market, but again, we have to very seriously question how much is actually revealed in this study.

Amherst strongly advises the Commission to critically consider the real value of this study, given its very narrow sampling strategy in comparison to the range of the period in question, the total number of stations in all markets, and the focus on top tier broadcast markets.

f. ***A Theory of Broadcast Media Concentration and Commercial Advertising*****— Brendan M. Cunningham, Department of Economics, U.S. Naval Academy, and Peter J. Alexander, Industry Analysis Division, Media Bureau, F.C.C.** (Study #2002-6)

> FCC Summation of Authors' Findings: This paper develops a model to estimate how consumers, advertisers, and broadcast outlets interact to determine the level of advertising when ownership structures in radio or television markets become more concentrated. The analysis finds that increased levels of concentration in broadcasting markets are likely to result in an increase in the proportion of non-programming material (commercials, PSAs, etc.) among those outlets with an increased market share. However, consumers' response to such increases is an important consideration for broadcasters in determining the extent to [which] non-programming material can be increased profitably.

Response: The above summation is based upon the authors' Executive Summary, but omits the last line, in which they "demonstrate a positive relationship between consumer welfare and the number of firms in the broadcast industry." In general, the study finds that concentration may mean more on-air advertising volume. The cost of advertising may also rise, and this cost may be reflected in consumer goods prices.

The substantial mathematical complexity of this study, combined with its hypothetical source matter, makes it very difficult for anyone but a skilled statistician to evaluate its integrity and worth. It is simply not possible, given our immediate resources and the short response time demanded, for us to give a fair evaluation of this report.

If the conclusions are sound, it may suggest a negative indicator for further broadcast concentration, and also suggests that concentration may negatively impact advertisers and consumers—the latter in two ways, through reduced non-advertising content. These findings would be consistent with our own concerns, and we would be pleased to be able to support the study. However, we do not have the resources to evaluate its worth, or even speculate on the value of its source material.

Amherst suggests that the Commission allow more time for commenters to review and evaluate this study. Alternately, we suggest that the report may have limited application as an empirical study of the effects of broadcast ownership concentration in a defined market.

B. Amherst Remarks

As we stated above, we are most vexed by the short amount of time afforded to all commenters to review and respond to the twelve empirical studies. The more technical statistical studies, in particular, require time and resources which may not be available on short notice to many commenters, ourselves included. For the Commission to so enthusiastically invite public comment and yet to afford inadequate time for so many of us to properly examine these documents is a disservice to the role of public review in the policymaking process.

Beyond this, what we have been able to glean from the more accessible studies seems to hint at a general lack of focus among and between the various study authors, and as well from the Commission itself in commissioning them, as there seems to be a lack of cohesion and central intent. Moreover, some of these studies seem much more focused on theory than empirical data. One, in fact, is entirely theory, lacking any internal empirical data of its own, instead relying entirely on foregoing work, the bulk of which appears not to have been formulated with the goals of this proceeding in mind.

Finally, there seem to be possible limitations and shortcomings in some or several of the studies, in that the sample sets seem quite small (in one case, only ten subjects), there may be inadequate presumptions in the theoretical formulations of the studies and analyses, and even some of the authors openly admit to limited application of the derived information.

In general, Amherst is very uncomfortable with the possibility of these studies forming the core of the Commission's determinations in respect to possible modification of existing ownership regulations. We very earnestly implore the Commission to reconsider not only its strategy of potential reliance on these findings, but in fact to rethink its fundamental approach to these issues—most particularly, the apparent assumption that the current strategy in fact poses the right questions and follows a sound plan to discovery.

Part II: Roundtable on Media Ownership Policies

Introduction

The Commission sponsored a roundtable discussion 29 October 2001 to discuss media ownership policies relevant to these Matters. Panellists in the discussion on "Ownership Policies and Competition" were Stanley Besen of Charles River Associates, Mark Cooper of the Consumer Federation of America, W. Robert Majure of the U.S. Department of Justice, and Bruce Owen of Economists Incorporated. Moderators were James Bird and David Sappington of the FCC. Panellists in the discussion on Ownership Policies, Diversity and Localism" were Douglas Gomery of the University of Maryland, Philip Napoli of Fordham University, and Joel Waldfogel of the University of Pennsylvania. Moderators were Jonathan Levy and Joel Rabinovitz of the FCC. Jane Mago and Robert Pepper of the FCC moderated the general panel of Concluding Observations.

The entirety of the roundtable discussion itself is available in transcript and streaming audio, but we have not had time to fully review it and compile notes, observations, and reactions. Instead, we here look at the accompanying statements supplied by four of the panellists.

A. Panellist Statements

1. Statement of Stanley M. Besen[14]

Mr. Besen argues primarily that the Commission's methods in researching issues like those in these Matters is limited because they do not provide a sufficiently reflexive balance of input between different parties and do not provide ample latitude for development of discussions into territory that the Commission may not have considered in initial public inquiries. He proposes a system of NPRMs in which a proposed rule is put out along with the Commission's own evaluation and explanation, as well as the underlying data set, so that outside commenters may fully evaluate the entire initial proceeding to better target their own evaluations and input. He further feels that this process, much more than current conventions, will more likely produce the body of solid empirical data—fully bound together with supporting analysis—that the FCC requires in order to make its structural regulation decisions, and to defend them when challenged.

Amherst enthusiastically supports Mr. Besen's advice for dealing with such complex issues as those in this proceeding. Like Besen, we are concerned that the body of empirical studies presented so far may not be sufficient to provide the support that the Commission will need to defend its decisions.

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[14] *Statement of Stanley M. Besen, Charles River Associates Incorporated, Prepared for Roundtable on FCC Ownership Policies,* 29 October 2001 (8-point "Summary Statement").

2. Statement of Dr. Mark N. Cooper[15]

Mr. Cooper provides a critical breakdown of the rationale behind the current rules and their justification. He notes that market competition by itself is not assurance of viewpoint diversity, because viewpoint is only one of many products offered by media. Further, where substantial competition exists, it is not nearly as "antagonistic" as the prevailing philosophy predicts that the current rules should instigate, but rather more sedate, as separate entities marketing similar but not identical products to a common consumer market.

Part of the reason for this oversight, he says, is that these notions "mistakenly equate entertainment with information and variety with diversity," and simplistically interpret economic competition as intellectual antagonism, "failing to recognize that outlets are not independent voices, when they have the same owners." He goes on to say that the broadcast product in highly concentrated markets tends to default to lowest-common-denominator selection, in order to maximise the economy of scale available to a common owner that is not available to separate owners. This tendency, he says, has the effect of marginalising less mainstream content of all forms, in favour of a narrower range of content product that provides the most advantageous return on cost for the broadcaster.

Dr. Cooper also reminds us that news and informational content is a special media product that provides a critical link in channels of information that alert the

[15] *Statement of Dr. Mark N. Cooper, Roundtable on FCC Ownership Policies,* 29 October 2001, under the aegis

public to abuse and fraud by various powerful persons and interests. Concentration of media can lead to a news imbalance, in favour of national focus, to the detriment of more localised news focus. Finally, he warns that prevailing rationales give too much weight to new, high-tech media, and not enough consideration to the real impact that ownership and control have on content, and the effect of structural design on access.

Structural rules, he argues, are entirely valid as provided in current policy, and the lack of ideal and optimal market patterns is not evidence that the rules are invalid, hurtful, or unnecessary. Rather, he insists, the burden is upon those desiring change to provide the evidence.

Dr. Cooper's Statement includes as an attachment the Senate Testimony of Gene Kimmelman of the Consumers Union[16] that we have not had time to review as closely as we would need to in order to provide a meaningful response, but we may include such in potential Additional Remarks. Mr. Kimmelman's Testimony includes a massive Appendix[17], also by Dr. Cooper, that we would very much like to review in more detail than time has permitted.

Amherst strongly supports Dr. Cooper's remarks, noting only that federal courts have apparently interpreted § 202(h) of the 1996 Telecom Act to require the Commission to

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of the Consumer Federation of America.

[16] *Testimony of Gene Kimmelman, Co-Director, Washington Office, Consumers Union,* Before the Senate Committee on Commerce, Science, and Transportation, *on Media Consolidation*, 17 July 2001.

[17] Appendix: "Mapping Media Market Structure at the Millennium," prepared by Dr. Mark N. Cooper.

clearly support the need for maintenance of its structural rules, which may impair the Commission's ability to demand clear evidence that the rules require modification.

3. Statement of Douglas Gomery[18]

Mr. Gomery argues that attempts to effect the stated goals of the Commission (competition, diversity, and localism) have met with mixed results, in most cases by either oversimplifying the issues involved or overlooking critical aspects and determinative factors involved. Most critically, he points to economic criteria as over-emphasized and too heavily relied upon to solve very important concerns that may not be merely unrelated to economic issues, but may in fact be contrary to media owners' economic goals. Increased diversity of content, for example, often costs more than mainstreaming of homogenous content, especially against the influence of economies of scale available to owners of large numbers of outlets of same or very similar media. He provides six "media performance norms" suggested by Dennis McQuail (in *Media Performance,* 1992): efficiency (as a product of direct competition), multiplicity of voices (as an indicator of market diversity), public order (as part of media's important and influential public role) , cultural quality (not merely as a determinant and evidence of market diversity, but also as a vital component to important public affairs coverage), technical change (as a means to limit the rate of ossification of power of established media leaders), and equity (as evidenced by comparative levels of access by different

[18] *Ownership Policies, Diversity, and Localism,* Douglas Gomery (statement prepared for Roundtable on FCC Ownership Policies, 29 October 2001).

demographic and economic groups, and especially as a concern regarding widespread access to vital news and information). The combination of multiple considerations like these, he says, is a much more confident means of ensuring media market balance for all parties (owners, operators, and consumers—also as citizens, he stresses), than more conventional and currently favoured univariant or duovariant strategies, or strict reliance on simplistic theories of media markets.

Mr. Gomery details his arguments in specific comparisons of the intent and expectation of key mass media rules and legislation for different media, and their actual apparent results.

The 1992 Cable Television Consumer Protection Act contains what he believes is a notable provision, "a clause intended to impose traditional public interest obligations in the new world of DBS," which he believes is a good model for debate over obligations of "public interest." Unfortunately, the current marketplace offers in the most advantaged markets only three choices in these areas.

The 1996 Telecom Act lifted national ownership limits on radio, all but erasing localism and diversity, and resulted in such rapid and massive escalation in economies of scale that the Department of Justice was forced to negotiate consent decrees on a case-by-case basis for proper shares of ad revenue per market, while ignoring other performance criteria. The present-day radio market witnesses "oligopolies" of chain stations, which by their very nature, while being more efficient across numerous markets, are inherently less efficient within the same markets, as competition dwindles and they are able to leverage ad rates and content source costs.

On 13 September 2001, the Commission requested comments on proposals for relaxing two of its longstanding rules: the newspaper-television cross-ownership rule, and the cable ownership rule. The problem with newspaper considerations, he notes, is that most communities have only one—a situation in which questions of competition become largely academic. And again, he notes, the ability of larger entities to direct their resources to more intensive and expansive coverage does not automatically mean that they will do so; in fact, reduced competition tends to reduce the need and desire for such investment, and instead encourages more cost-maximising tactics such as syndicated content from centralised sources, and more mainstream content. In respect to cable, Gomery argues that the existing market structure of cable is inherently monopolistic, and that further concentration will only frustrate efforts to create more diverse and localised content. Moreover, corporate conglomeration has resulted in the vast majority of major cable channels being owned by a small number of very large companies. Finally, despite hopes expressed at the time of the 1996 Telecom Act, cable and DBS continue to provide very little in the way of locally oriented content.

Gomery concludes that the Commission needs to consider a broader range of issues, particularly "externalities," in its goals of diversity and localism. He asks the Commission to rethink radio ownership policies, and maintain the current newspaper and cable rules.

Amherst supports Mr. Gomery's arguments, particularly in respect to broadening the range of critical factors considered in respect to the intent and consequences of media ownership rules, as insurance of market diversity and localism, and we emphatically support his advice to rethink radio ownership rules, and maintain current newspaper and cable ownership rules.

4. Statement of Philip M. Napoli[19]

Mr. Napoli approaches the question of ownership regulation by investigating two of the Commission's longstanding stated criteria, diversity and localism. Both are broken down and discussed in intensive theoretical terms.

In respect to diversity, he first notes that the conventional presumption that source diversity promotes content diversity is not so far confidently demonstrated by empirical data, as shown in a number of court cases. To better grasp the concept of diversity, he considers a three-part breakdown, including two elements long in use by the Commission—"source" diversity and "content" diversity—and adds a third of his own devising, "exposure" diversity, which he describes as "the diversity of content or sources consumed by audience members." This third variable, he suggests, offers a much more precise means for measuring—and possibly predicting—the societal impact of changes in media structure, particularly on the local level. Such a full understanding, he urges, is absolutely essential to appropriate policy management, in the same way that economics policymakers must have a solid grasp of the cause-and-effect patterns of economic spheres. Finally, he advises, source-diversity-focused policies should include strategies for sustaining those outlets.

In respect to localism, Napoli first makes the vital assertion that, "When we acknowledge the media as a significant political institution, the function of localism as a communications policy objective becomes related to traditional democratic theory objectives such as enhanced political participation and better informed political decision making." From there, he notes that research has drawn a positive relationship between local participation in media and positive indicators in local communities, suggesting that maintaining and enhancing localism as a policy objective thereby positively affects broader objectives. These objectives are important enough, and the correlation clear enough, that policy considerations should be prepared to closely examine actual content in local outlets, because local ownership does not in itself assure local content. He recommends a two-part approach to the goal of localism, promoting both local ownership and local content.

Amherst supports Mr. Napoli's very thoughtful and in-depth consideration of these factors that we also consider vital not only to media itself but in fact to democracy. We

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[19] *Diversity and Localism: A Policy Analysis Perspective,* Philip M. Napoli, Graduate School of Business Administration, Fordham University (statement prepared for Roundtable on FCC Ownership Policies, 29 October 2001).

encourage the Commission to give considerable weight to these arguments and suggestions. Like Mr. Napoli, we encourage the Commission to consider the value of current empirical studies by how well they evaluate their data according to criteria like that proposed in this statement, and to withhold major or irrevocable modifications until such time as more confident information can be assembled and analysed.

B. Amherst Remarks

We agree with these statements in their serious concerns and questions regarding the Commission's overall strategy and theory in approaching these very important and long-reaching issues, and we support their earnest appeal for the Commission to consider a more involved and in-depth strategy in formulating its approach, even extending as far as revisiting its own base criteria for defining its goals and concerns.

Empirical evidence does not seem to fully support current thinking, but neither does it any more so invalidate the prevailing underlying schema in ownership policies. We feel, as do the authors of these comments, that an in-depth reconsideration of these schema is demanded before truly meaningful empirical studies can be formulated and evaluated.

Part III: Amherst Concerns

We first reiterate our complaint that more time is needed in order for all commenters to adequately review and evaluate all of these studies. If the Commission really does intend for these to be the core of its decision, then it behoves them to afford enough time for the broadest range of those who wish to comment on them directly to apply the necessary resources and make complete and meaningful evaluations. We are very disappointed that more time has not been afforded for public comment.

We are very concerned that at this time, the actual effects of consolidation remain undetermined, as revealed by the uncertain conclusions of many of the study authors, and the claims of the Roundtable participants that the base schema underlying the Commission's investigative strategy may be flawed or inadequate, so that even complete and determinative empirical studies may not be adequate if they are based in these schema and theories. There is also some harm implied, and possibly even evidenced, in some of these studies, therefore contraindicating further relaxation of current rules. Further, the current media landscape remains in a state of rapid development, rendering even valid and observable baselines unstable and possibly unusable. The pending rollout of DAB remains an almost entirely unknown factor, given both the dramatic history of radio as a primary local outlet, and ongoing controversy over implementation of the very highly contended IBOC standard. (Amherst, among numerous other commenters, strongly opposes IBOC as a DAB standard, both for its unnecessary and damaging impact on current AM and FM, and the ready availability of other options, including alternative bands and technologies.)

We further maintain that aside from the lack of clear evidence of the effects of further media consolidation, there is also no clear evidence of any real benefit from consolidation. Until such time as genuinely well-planned and conclusive empirical studies can point to answers to these concerns, we insist that the Commission lacks the evidence necessary to justify modification of current rules. We appreciate that court rulings have demanded this evidence, ostensibly as justification for maintenance of existing rules, but we feel that the Commission may make a reasonable argument that further and deeper study is needed before this evidence can be produced, and that the risks of irremediable damage and injury are too great to propose modification in such an informational vacuum. As long as real progress continues in this regard, the clear good faith of the Commission is evident in terms of satisfying judicial requirements.

Amherst very emphatically implores the Commission to request latitude from the courts in order to better and more fully prepare its case, and to assemble the evidence needed in a manner that truly reflects the best effort possible to determine the real effects of further media ownership consolidation. In respect to the twelve empirical studies submitted so far, we request additional time to review and evaluate them.

Acknowledgements and Author Signatory

While Wesle AnneMarie Dymoke of Providence, Rhode Island is the primary author of these Reply Comments, The Amherst Alliance acknowledges that the following persons contributed to this document, providing advisory, clerical, administrative, and/or logistical support at various points in its creation:

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Wesle AnneMarie Dymoke 1 February 2003

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ATTACHMENT

WHAT

SECTION 202(H)

OF THE TELECOMMUNICATIONS ACT OF 1996

ACTUALLY REQUIRES

An Analytical Paper

Prepared For THE AMHERST ALLIANCE

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THE AMHERST ALLIANCE has asked me to conduct a brief analysis of Section 202(h) of the Telecommunications Act of 1996. My credentials for conducting such an exercise in statutory construction include 15 years of direct experience with the drafting, enactment, implementation, interpretation and amendment of statutes:

- 3 years as a Congressional staffer:
  - 1 year as a Legislative Analyst with the House [of Representatives] Republican Research Committee
  - 2 years as Legislative Counsel to U.S. Representative Matthew Rinaldo (R-NJ), who served before his retirement as Ranking Republican on the House Telecommunications Subcommittee
- 12 years as a Government Relations executive with the American [Natural] Gas Association:
  - 5 years as Director of Legislative and Regulatory Affairs
  - 4 years as Special Counsel and Executive Assistant to the Vice President, Government Relations
  - 2 years as Director of State, Local and Coalition Relations
  - 1 year as a staff attorney for Legislative and Regulatory Affairs

As a result of this experience, I was professionally involved with drafting, enactment, implementation and interpretation of the Natural Gas Policy Act (NGPA) of 1978, the Powerplant and Industrial Fuel Use Act (aka "the Fuel Use Act", or FUA) of 1978, the Clean Air Act Amendments (CAAA) of 1977 and the Clean Air Act Amendments (CAAA) of 1990. In the case of the first two statutes, I was also the natural gas industry's leading attorney in efforts to amend and repeal portions of these statutes. These legislative efforts succeeded in 1986, after a 6-year lobbying campaign.

In 2000, as National Coordinator of THE AMHERST ALLIANCE, I was a leader in lobbying efforts to block Congressional legislation that would have overturned the FCC's new Low Power FM Radio Service. Although restrictive legislation was ultimately enacted -- through an Appropropriations bill "rider", during a "lame duck" Session of Congress, that avoided both a Hearing and a vote in the jurisdictional Senate Committee -- the House of Representatives was nevertheless persuaded to adopt an amendment that preserved Low Power FM licensing opportunities in most small cities, small towns and rural areas, as well as in a handful of scattered urban and suburban neighborhoods. The cycle of legislative action took just under 1 year.

In addition, I have 5 years of experience with the interpretation and enforcement of statutes *by the courts:*

- 3 years as a Law Clerk in the courts of New Haven, Connecticut
- 1 year as a Legal Services lawyer with Blue Ridge Legal Services of Harrisonburg, Virginia
- 1 year as a solo practitioner of Family Law in Harrisonburg, Virginia

Overall, I have spent 21 years with the legislative life cycle: from drafting to enactment, to implementation and interpretation, to application and enforcement by the courts, back to drafting and enactment of amendments to those statutes.

I also hold a law degree from George Washington University and a B.A. in Government and English from Wesleyan University.

The Exact And Complete Text
Of Section 202(h)

A logical place at which to begin our analysis is with the *exact* and *complete* text of Section 202(h) of the Telecommunications Act of 1996. The entirety of Section 202(h), containing the much-cited Congressional mandate for biennial Commission review of media ownership "caps", reads as follows:

> **(h) Further Commission Review. -- The Commission shall review its rules adopted pursuant to this section [*Section 202: Broadcast Ownership*] and all of its ownership rules biennially as part of its regulatory review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.**

We can make at least 4 key observations about this two-sentence sub-section.

Section 202(h) Does *Not* Place The Burden Of Proof
On Defenders Of Existing Media Ownership Limits

(1) The statute does not *place the burden of proof upon defenders of the existing restrictions.* This point may seem clear on its face -- if not obvious -- from the plain language of the statutory mandate. "The Commission shall determine whether any of such [broadcast ownership] are necessary". There is *no* statutory directive for the FCC to establish a presumption in favor of repealing the restrictions, or for that matter in favor of retaining the restrictions. The FCC is only directed to *make a determination,* without placing a burden of proof on those who oppose, or favor, change.

While the absence of a burden of proof may be clear from a simple reading of the statutory language, this state of affairs is apparently not obvious to all. In a January 13, 2003 address before a Conference at Columbia Law School, FCC Chairman Michael Powell offered this interpretation of Section 202(h):

> Every two years, the Commission is required by law to review these limitations on ownership. And the statute requires the FCC to presume each rule is no longer needed unless we prove otherwise.

The *first* sentence in this statement is correct. The second sentence is not. A look at the exact and complete text of Section 202(h) reveals *no* requirement for the FCC "to presume each rule is no longer needed unless we prove otherwise".

FCC Commissioner Kevin Martin, speaking on the same occasion about the same statutory language, presented a more accurate description of the statutory mandate:

> Congress instructed us [the Commission] to review our media ownership rules every two years to make sure they are still necessary.

Period -- without a presumption *either* way. The point is an important one.

**Judicial Expectations and Requirements
Relate To Thoroughness Of Deliberations,
Not Substantive Policy**

(2) A judicial requirement for decision-making based on exhaustive empirical evidence does not *automatically equal establishment of a presumption in favor of repealing current media ownership restrictions.* In statements by the Commission and individual Commissioners alike, repeated references have been made to court decisions reversing Commission decisions against repeal or loosening of media ownership limits.

However, these court rulings took the Commission to task primarily for the alleged *procedural* flaw of not basing its decisions on sufficient empirical evidence. This criticism does not automatically address the separate *substantive* question of whether the Commission actually selected the wrong policy. Had the Commission decided the *other* way, the Commission's decision(s) might *still* have been reversed -- if they had been based on the same, allegedly insufficient evidence.

Court rulings, in short, have told the Commission that it must be more thorough in general -- and more empirical in particular -- as it reviews media ownership rules. This is a directive for the Commission to "do its homework" more thoroughly before it makes a decision. It is *not* a directive for the Commission to presume that repeal is justified unless a burden of proof to the contrary has been overcome.

**Section 202(h) Sets Two Separate Standards
For Requiring Commission Action
To Change Existing Regulations**

(3) The statute provides two standards for the Commission to apply in making its determination: whether media ownership restrictions are "necessary … as the result of competition" *and* whether the existing media ownership rules are "in the public interest". *These standards are listed separately, implying that they must be* met *separately. That is:* Both *standards must be met before existing media ownership restrictions have to be changed. At least at present, however,* neither *standard can be met by advocates of repealing the current restrictions.*

The first sentence of Section 202(h) states that the Commission should determine whether any of its media ownership rules are "necessary in the public interest as the result of competition". The concepts of "the public interest" and "competition" are linked here, suggesting strongly that Congress viewed "competition" as *one component* of "the public interest".

At the same time, Congress did not view "competition", standing alone, as the *totality* of the public interest. Instead, Congress decoupled the word "competition" from the phrase "the public interest" in the second sentence of Section 202(h). Only "the public interest" is set forth as an analytical standard in the second sentence of Section 202(h): there is no reference to "competition" at all.

Taken together, the two sentences suggest that Congress envisioned a two-pronged test for the Commission's media ownership rules: (A) whether or not a rule is necessary in light of the prevailing level of competition (or lack of it) within the media industries; *and* (B) whether or not a rule is necessary in light of *the remainder* of "the public interest" (that is: those components of "the public interest" *other than* competition alone).

(A) The prevailing level of competition within the media industries. Frankly, the language of Congress regarding this standard -- that is, whether or not a given media ownership rule is "necessary in the public interest as the result of competition" -- is rather awkwardly phrased. Images arise of a late-night legislative drafting session in some Congressional office, conducted by an overworked and groggy collection of people rather than a single individual with a consistent style of expression.

Nevertheless, in light of basic economic theories regarding the regulation of businesses by government, the intent of Congress is discernible.

From the time the Democratic Party (and, under President Theodore Roosevelt, the Republican Party) absorbed much of the thinking of the Populist and Progressive movements of the late 19th and early 20th centuries -- which were themselves triggered largely by the abuses of railroad and banking monopolies and oligopolies, especially on what was then the Western frontier, and the abuses of *political* monopolies ("machines") in the large Eastern and Great Lakes cities -- until historically recent times, it was generally a point of bi-partisan political consensus that monopolies should not be allowed to operate without accountability. During most of the 20th century, the political debate over the accountability of large corporations focused on *how* to hold such corporations accountable -- not *whether* to hold them accountable.

Some leaders and thinkers have prioritized corporate accountability to the *marketplace,* with this goal to be achieved primarily by *antitrust laws* that would theoretically prevent any single corporation, or any single handful of corporations, from gaining too large a share of the market in a given concentration-prone industry. With this approach, it was assumed that large corporations would essentially "self-regulate" because their customers (or potential customers) would have other places to go -- and would go there if the corporation attempted to abuse its market power.

Other leaders and thinkers have prioritized corporate accountability to *government oversight,* with this goal to be achieved through varying degrees of government regulation -- usually, although not always, conducted on an industry-by-industry basis. Under this approach, corporations could be allowed to become larger, and anti-trust principles could be applied more sparingly, because government oversight would be *substituting,* to a greater or lesser extent, for accountability through competition. The most comprehensive application of this reasoning was the creation of the *regulated* monopoly, such as AT&T and the former Bell System or natural gas and electric utilities overseen by State and/or local Public Utility Commissions.

Since the onset of the Reagan Administration, Presidential Administrations of both major political parties have -- to a greater or lesser extent -- successfully pressed for reductions in government oversight of corporations, *without* simultaneously increasing the enforcement of anti-trust laws to compensate. Indeed, anti-trust enforcement has declined during the same period, in tandem with the decline of government oversight. The *de facto* -- and presumably intended -- result has been a return to the prevailing economic theories of the 1860's and 1870's, when large corporations were unrestrained by either government regulation *or* anti-trust laws.

On the question of corporate accountability, recent Presidential Administrations have been literally to the Right of Adam Smith. While Adam Smith did not generally favor government regulation of business, he *did* see a vital role for government as an *enforcer* of uniform "rules" (such as anti-fraud statutes) for governing the competition between businesses. As the recent one-sided settlement with Microsoft re-affirms, the government is now reluctant to play even this limited role.

In any event, despite the historically recent changes in Presidential thinking, Congress has tended, at least most of the time, to stay within the framework of the two classic post-Populist/post-Progressive choices: that is, prioritizing competition, with the vigilant enforcement of anti-trust laws as a "backstop", *or* prioritizing government regulation, but in any case doing one or the other (or a combination of the two) rather than abandoning the goal of corporate accountability entirely.

This *relative* “either/or emphasis” in Congress is evident in recent Congressional Hearings on FCC policies, during which most of the participating legislators strongly questioned the wisdom of removing the Commission’s remaining restrictions on media ownership. However, the same “either/or emphasis” is *also* evident in the wording of the very statutory mandate that has led the Commission to its current deliberations.

Again, we return to the first of two statutory criteria for determining whether the FCC is required to change a particular media ownership restriction: that is, whether the rule is still “necessary … as the result of [*meaning:* in light of the prevailing level of] competition” [in the media industries].

Seen in terms of the “either/or emphasis” that dominated American economic policy for most of the last century, the question is: Has competition within the media industries *increased* enough, since enactment of the Telecommunications Act of 1996, to substitute for governmentally imposed media ownership restrictions?

The answer is plain: *No.* Competition has not increased at all. It has *decreased.* *Intra*-industry competition has reached record lows, especially in the radio industry, with market consolidations of stunning dimensions. Further, although it generally has much less of an impact on corporate behavior than intra-industry competition, *inter*-industry competition has declined as well, with stunning cross-industry mergers and acquisitions, including the massive and historically unprecedented (and yet, apparently, economically inefficient) fusion of radio, TV, print *and* the Internet in the AOL/Time-Warner merger.

Thus, the contemplated removal of the FCC's remaining media ownership restrictions fails the *first* prong of the two-pronged statutory test. Neither intra-industry nor inter-industry competition has increased enough, since enactment of the Telecommunications Act of 1996, to substitute for the current level of media ownership regulation. Instead, contrary to the expectations of some decision-makers in 1996, both intra-industry and inter-industry competition have decreased.

This fact of life alone should be sufficient to sink the idea of further media ownership deregulation at this time.

(B) Other Components Of "The Public Interest". Even if competition within the media industries had been falling, rather than rising, the second sentence of Section 202(h) still requires the Commission to act on any particular media ownership restriction *only* if such action *also* serves the *overall* "public interest" -- including those components of "the public interest" *other than* competition.

The Commission itself has acknowledged that more than competition alone must be considered before any media ownership restriction is changed. In announcing the February 27 Field Hearings in Richmond on media ownership regulations, the Commission stated that the Hearings would focus on ways to promote "competition, diversity and localism". Within this statement is an inherent acknowledgement that *at least* two other goals besides "competition" -- that is, "diversity" and "localism" -- must be served by any choice to change one or more of the media ownership rules.

THE AMHERST ALLIANCE -- the Net-based, nationwide citizens' advocacy group for whom I have prepared this analytical paper -- asserts that "the public interest" includes *even more* "components" than "competition, diversity and localism". Without exhausting the list of factors to be considered, the components of "the public interest" *also* include: increased opportunities for *individuals* to gain employment, and ideally upward mobility, within the media industries … increased opportunities for *small businesses* to enter and thrive within the media industries, ideally growing into mid-sized or even large corporations, *without* being acquired and absorbed along the way by a larger entity … media operations that do not cause reasonably preventable harm to the natural and/or human environment … *and* system survivability and reliability, including the national security goal of media operations which can withstand, or at least quickly rebound from, hostile action by terrorists or other enemies of the United States.

The historically recent trends toward acquisition *and* extinction of small, independent, locally owned and community-oriented radio stations -- in response to the media ownership deregulation that has *already* occurred, coupled with the imposition of mandatory license auctions -- certainly demonstrate that further media ownership deregulation, at least at this time, will serve neither "competition" *nor* "diversity" *nor* "localism".

Given the losses of broadcasting jobs from "market consolidation" -- *plus* the disappearance of many entrepreneurs, and/or "Mom and Pop" teams, who once had dreams of "growing" a small company into something larger -- further media ownership deregulation is likely to further undercut the nation's stated goals of full employment, upward mobility for all who are willing to work and accelerated growth opportunities for small businesses. Since small businesses now tend to generate new jobs at a much faster rate than large corporations, these three policy goals are related -- and *all* of them would be further impeded by further deregulation of media ownership.

Finally, from a system survivability/national security perspective, a relative handful of centralized points of media control are more vulnerable to disruption -- by natural disaster or human attack -- than a decentralized multitude of independent media operations. How many small towns and farms would be without radio stations completely if a Chinese attack swept communications satellites from the sky? How many TV shows would be "blacked out" by a giant earthquake in Los Angeles -- or the explosion of a "suitcase" atomic bomb in Manhattan?

In short:

Judged against *any* of *several* different components of "the public interest" -- including, but not limited to, "competition" *and* "diversity" *and* "localism" -- removal of the remaining media ownership restrictions would do great harm, while accomplishing little, if any, good.

**When And If Change Is Needed,
Section 202(h) Allows The Commission To Pursue
Other Options Besides "Repeal"**

(4) The statute directs the Commission to "repeal or modify … *any [broadcast ownership] regulation which it determines to no longer be in the public interest". The words* "or modify" *have not received nearly enough attention.*

So far, the debate over the remaining media ownership restrictions has largely focused on the question: To repeal or not to repeal?

However, the option to "modify", which is given "equal billing" with the option to "repeal", raises the possibility that the Commission could initiate a loosening of current media ownership restrictions *if* something short of complete repeal were determined to be consistent with competition and also "in the [overall] public interest".

The phrase "to modify" *also* raises a more dramatic possibility: action to "modify" current media ownership restrictions by making them more *restrictive.* There is *nothing* in Section 202(h) which states that modifications must always move in the direction of less regulation. This is widely presumed, but it is not what Section 202(h) actually says.

What Section 202(h) actually says is that: (A) the Commission must review all of its media ownership rules every 2 years; (B) the Commission must determine which rules are "necessary" in light of the existing state of competition in the broadcasting industry *and* in light of "the public interest", which implies that (C) the Commission must also make an assessment of the existing state of competition in the broadcasting industry *and* a determination of what actually constitutes "the public interest"; and then (D) the Commission must "repeal or modify" any broadcast ownership regulations which are no longer "necessary", in light of the existing state of competition in the broadcasting industry, *and which are also* no longer in the overall public interest.

The Commission cannot make the decision(s) required in Step D without *first* going through the analytical processes in Steps B and C. By the same token, Congress, when it enacted the Telecommunications Act of 1996, could not have pre-judged what the Commission should decide as Step D in 2003 -- because Congress could not have had foreknowledge of the information that would be analyzed by the Commission, in 2003, during the course of completing Steps B and C.

In light of the fact that Congress could not foresee the nature of market conditions and/or "the public interest" in 2003, or 2005, or 2023, *and* in light of the fact that Congress clearly wanted the Commission to take time-specific conditions into account, the elasticity of the statutory word "modify" makes perfect sense.

Congress may well have *guessed,* in 1996, that competition would increase under deregulation, perhaps even to a point that would make legal restrictions on media ownership unnecessary, but Congress was evidently prudent enough to leave room for the Commission to move in *either* direction -- toward less regulatory oversight, or *more* -- as conditions changed from one biennial review to the next.

This prudence was prudent in light of the fact that competition has *decreased,* rather than increased, in the wake of partial media deregulation. The media market is now more "consolidated" than ever.

The Congressional intent that the Commission should have *flexibility* over time, to increase or decrease regulatory oversight in light of changing market (and social) conditions, is further implied by the fact that Congress *placed no time limit* on the mandate for reviewing media ownership regulations. The reviews must occur *every* 2 years, *regardless* of the policy results from the review 2 years before.

Had Congress intended the Commission to be "locked into" complete media ownership deregulation, the statute would have ended the regulatory review mandate when and if the Commission ever decides to embrace complete media ownership deregulation. Instead, the mandate for cyclical reviews remains in place *indefinitely* -- suggesting that Congress wanted the FCC to be able to "swing both ways", in response to conditions that change over time.

At this time, at a *minimum,* the Commission should decline to walk any further down the road to complete media ownership deregulation.

Ideally, the Commission should take this opportunity to reverse its past course, in light of the excessive market consolidation which has already occurred, and make its current media ownership restrictions *more* restrictive and *more* comprehensive.